

DAVID H. BECKER (OSB # 081507)
Law Office of David H. Becker, LLC
833 SE Main Street # 302
Portland, OR 97214
(503) 388-9160
davebeckerlaw@gmail.com

Attorney for Plaintiff Native Fish Society

PETER M.K. FROST (OSB # 91184)
Western Environmental Law Center
1216 Lincoln Street
Eugene, OR 97401
Tel: (541) 359-3238
Fax: (541) 485-2457
frost@westernlaw.org

Attorney for Plaintiff McKenzie Flyfishers

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

NATIVE FISH SOCIETY,
MCKENZIE FLYFISHERS,

Plaintiffs,

v.

Case No.: 3:12-cv-431-HA

**MOTION FOR PARTIAL
SUMMARY JUDGMENT**

**NATIONAL MARINE FISHERIES
SERVICE, PENNY PRITZKER,**
Secretary of Commerce, **WILLIAM STELLE,**
Regional Administrator, NMFS, **OREGON
DEPARTMENT OF FISH & WILDLIFE,**
ROY ELICKER, Director, ODFW,
BRUCE McINTOSH, Acting Fish
Division Administrator, ODFW, **CHRIS
WHEATON,** Northwest Region Manager,
ODFW,

ORAL ARGUMENT REQUESTED

MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants.

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56-1, plaintiffs Native Fish Society and McKenzie Flyfishers (collectively “NFS”) respectfully request that the Court enter summary judgment in NFS’s favor on the Third, Fourth, Fifth and Sixth Claims of the Second Supplemental and Amended Complaint (Dkt # 136). Pursuant to Local Rule 7-1, the undersigned hereby certifies that counsel have conferred and were unable to resolve the dispute. Federal Defendants will oppose this motion.

NFS respectfully requests that this Court grant the declaratory and injunctive relief specified in NFS’s Supplemental and Amended Complaints, including:

1. Order, declare, and adjudge that the National Marine Fisheries Service (“NMFS”) violated the Endangered Species Act (“ESA”) and the Administrative Procedure Act (“APA”) by issuing a decision (“Section 4(d) Decision”) approving the Hatchery and Genetic Management Plans (“HGMPs”) for the Sandy Hatchery that is arbitrary and capricious, an abuse of discretion, and not in accordance with law;
2. Order, declare, and adjudge that the National Marine Fisheries Service (“NMFS”) violated the ESA and the APA by issuing a biological opinion for its Section 4(d) Decision approving the HGMPs that is arbitrary and capricious, an abuse of discretion, and not in accordance with law;
3. Order, declare and adjudge that NMFS violated the National Environmental Policy Act (“NEPA”) and the APA by issuing the Section 4(d) Decision without complying the NEPA, including by failing to prepare an Environmental Impact

Statement (“EIS”), failing to consider reasonable alternatives, failing to consider mitigation, and failing to consider cumulative impacts;

4. Order, declare and adjudge that NMFS has failed to reinstitute formal consultation on the action covered by the biological opinion, in violation of the ESA and its implementing regulations, and order NMFS to reinstitute formal consultation;
5. Hold unlawful and set aside the Section 4(d) Decision for violating the ESA, NEPA, and the APA, and order NMFS to prepare an EIS for the Sandy Hatchery programs;
6. Hold unlawful and set aside NMFS’s biological opinion, and order NMFS to rescind the biological opinion, including the associated Incidental Take Statement, and consult again to issue a valid biological opinion for the Sandy Hatchery programs;
7. Retain jurisdiction over this matter until such time as NMFS has fully complied with the Court’s order;
8. Award plaintiffs their reasonable costs, litigation expenses, and attorney fees associated with this litigation pursuant to the ESA, the EAJA, 28 U.S.C. § 2412 *et seq.*, and all other applicable authorities;
9. And any other such further relief as the Court deems just and proper.

In support of this motion, NFS respectfully refer the court to the Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment, including the documents attached thereto, to the Third Declaration of Dr. Christopher A. Frissell, the Declaration of Gordon Luikart, the Declaration of Mark Lewis, and to the administrative record lodged by NMFS with this Court.

DATED this 16th day of August 2013

Respectfully submitted,

/s/ David H. Becker

David H. Becker (OSB # 081507)

Law Office of David H. Becker, LLC

Attorney for Plaintiff Native Fish Society

/s/ Peter M.K. Frost

Peter M.K. Frost (OSB #91184)

Western Environmental Law Center

Attorney for Plaintiff McKenzie Flyfishers